Filed 11/14/03 In re Kimberly M. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re KIMBERLY M. et al., Persons Coming Under the Juvenile Court Law.	
FRESNO COUNTY DEPARTMENT OF CHILDREN & FAMILY SERVICES, Plaintiff and Respondent v. FELICIA K., Defendant and Appellant.	F043046 (Super. Ct. No. 01CEJ300141) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. A. Dennis Caeton, Judge.

Beth A. Melvin, under appointment by the Court of Appeal, for Defendant and Appellant.

Phillip S. Cronin, Fresno County Counsel, and Howard K. Watkins, Deputy, for Plaintiff and Respondent.

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[*] Before Ardaiz, P.J., Gomes, J. and Dawson, J.

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Appellant Felicia K. appeals a juvenile court visitation order allowing "unforced" visits with her 13- and 11-year-old daughters. We conclude appellant has waived her right to challenge this issue, and affirm the order.

FACTUAL AND PROCEDURAL HISTORY

Appellant has two daughters, now 13-year-old Kimberly and now 11-year-old Ashley, who were removed from her care in July 2000 after she was arrested for striking Ashley's calves with stereo wire and leaving open wounds. The girls were placed with their father, where they remain. At the initial detention hearing, the court ordered supervised, unforced visits for appellant. At the six-month review hearing, appellant was granted an additional six months of reunification services. She had been visiting with then 11-year-old Kimberly, but then 9-year-old Ashley refused to visit appellant.

In June of 2001, Ashley revealed to her father that appellant had repeatedly sexually abused her for approximately three years prior to her removal from appellant's care. Appellant was charged with continuous sexual abuse of a child, and the department filed a Welfare and Institutions Code section 342 petition to add the new allegations of abuse. In October of 2001 the allegations in the amended petition were withdrawn in exchange for appellant agreeing to termination of any reunification services. The minors were continued as dependents under a plan of family maintenance with their father, and the unforced visitation order with appellant remained in effect.

At a February 21, 2003, review hearing, appellant's counsel requested a mediation date "so visitation can be worked out and an exit order." No one appeared for the mediation. At the March 21, 2003, continued hearing appellant did not appear. The social worker orally recommended continuing unforced visitation (the same visitation that had been in effect the whole dependency) and appellant's counsel submitted. The

court terminated the dependency and ordered that appellant was "to have no visits with the minor [*sic*] except at the request of the minors …." Appellant timely appeals.[1]

DISCUSSION

Waiver

Respondent submits that appellant cannot raise the issue of visitation on appeal because she waived it by submitting on the social worker's oral recommendation and written report. Appellant maintains that her "submittal" was ambiguous and therefore did not constitute a waiver of her right to appeal visitation issues. We agree with respondent and find the issue waived.

In this case, the social worker's report for the March 21st hearing (continued from February 21st) omitted any recommended orders. However, at the hearing – before any submission or statement was made by appellant's counsel – the social worker stated:

> "Both children completed therapy with Carrie Rochin. They both continue to receive psychotropic medications which are prescribed through doctors at the county. The court's order for visitation has been supervised visits that are unforced. Kimberly chooses to visit, Ashley doesn't. Our recommendation which is presented in the report of February 21st is that the court terminate dependency on this family, grant sole legal and physical custody to the father …. My recommendation would be that the court enter an order for visitation, a visitation order for the mother that the mother is to have no visits with the minors unless the minors request and that upon request she may have supervised visits."
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> All counsel then immediately expressly submitted:
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> "[Minor's Counsel]: Submitted.
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> "[Mother's Counsel]: Submitted on behalf of the mother."

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[1] We liberally construe appellant's improper characterization of her appeal as an appeal from a termination of parental rights as an appeal from the orders made at the March 21, 2003, hearing that her notice of appeal identifies. (See Cal. Rule Ct., rule 1(a)(2).)

A parent waives his or her right to challenge a juvenile court's order when the parent submits the matter on the social worker's recommendation. (*In re Richard K.* (1994) 25 Cal.App.4th 580, 589-590.) By submitting on the recommendation, the parent is endorsing the court issuing findings and orders based on the recommendation. (*Id.* at p. 589.) The court in *In re Richard K., supra,* distinguished a parent's submission on the social worker's *recommendation* from a parent's submission on a social worker's *report*, noting that the latter does not constitute a waiver of the parent's right to challenge the sufficiency of the evidence. (*Ibid*.) Appellant maintains that she has not waived the issue because she says the omission of a recommendation in the written report renders her submission "ambiguous." We disagree. The Department's recommendation was stated very clearly on the record immediately preceding counsel's submission, not to mention the fact it was a recommendation to maintain the very same visitation order that had been in place throughout the proceedings. There was no ambiguity. (*In re Richard K.*, *supra*, 25 Cal.App.4th at pp. 589-590.)

Appellant's reliance on *Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798 and *Deborah S. v. Superior Court* (1996) 43 Cal.App.4th 741 is unavailing. This court in *Steve J*. merely reiterated the general rule we apply here: "a parent who submits on a recommendation waives his or her right to contest the juvenile court's decision if it coincides with the social worker's recommendation." (*Steve J. v. Superior Court*, *supra*, 35 Cal.App.4th at p. 813.) *Steve J*. simply acknowledged that on the record before it counsel had "submitted," then expressed disagreement with certain portions of the recommendation. (*Ibid*.) We have no such ambiguity here. *Deborah S. v. Superior Court*, *supra*, 43 Cal.App.4th 741, is equally unhelpful to appellant. In that case, this court, in a footnote, noted that it would not interpret a silent record to represent a waiver of a claim for services. (*Id*. at p. 748, fn. 5.) Again, we have no such silence or ambiguity here. In this case, after the Department made a very clear recommendation on the record, appellant's counsel stated: "submitted."

Appellant additionally urges us to ignore the waiver issue because her visitation complaint "involves a pure question of law." However, appellant raises this issue for the first time in reply and presents no argument or discussion of the issue, citing only to one case for authority. We do not address issues raised for the first time in reply. (*People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26.)

In any event, we feel compelled to note that the visitation order appellant now complains of has been in place since the detention hearing – *nearly 30 months* prior to the hearing from which appellant appeals. Thus, counsel for appellant (in appellant's absence) merely submitted on a recommendation that had already been an order for more than two years, and any complaints appellant had about the propriety of the visitation order should have been made at detention. "As a general rule, a party is precluded from urging on appeal any point not raised in the trial court. [Citation.] Any other rule would ""'permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not.'"' …." (*In re Riva M.* (1991) 235 Cal.App.3d 403, 411-412; *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1338-1339; *In re Gilberto M.* (1992) 6 Cal.App.4th 1194, 1198 [failure to raise issue of notice at a Welfare and Institutions Code section 366.21 hearing constituted waiver of issue on appeal].) Moreover, at the point that the dependency was being terminated, to the extent appellant wanted to change the visitation order that had been in place for approximately 30 months, she would have needed to show a change of circumstances to justify it.

DISPOSITION

The judgment (order) is affirmed.